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ALEXANDER L. STEVAS,
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NO. 82-110

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CHESTER ORSINI,
Petitioner

v.

STATE OF CONNECTICUT,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

JOHN R. WILLIAMS
Williams & Wise
265 Church Street
New Haven, Conn.
(203) 562-9931

Counsel for Petitioner

July , 1982

QUESTIONS PRESENTED

1. Was the petitioner denied due process of law at his State criminal trial when the Court instructed the jury simply to choose between the comparative credibility of prosecution witnesses and defense witnesses?

2. Was the Petitioner denied due process of law by a persistent felony offender conviction based solely upon a prior conviction for violation of an anti-abortion statute which was unconstitutional under the holdings of this Court in Roe v. Wade, 410 U.S. 113 (1973), and Connecticut v. Menillo, 423 U.S. 9 (1975)?

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PETITION FOR A WRIT OF CERTIORARI TO
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STATE OF CONNECTICUT

The petitioner, Chester Orsini, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on June 1, 1982.

OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut is reported at 187 Conn. 264 (1982), and appears in the Appendix hereto. A motion to reargue was filed on June 4, 1982, and was denied on June 16, 1982. The motion and the order

are printed in the Appendix hereto. On June 16, 1982, the Connecticut Supreme Court, suo motu, amended its opinion, and the notification of such amendment from the reporter of Judicial Decisions also is printed in the Appendix hereto.

JURISDICTION

The opnion of the Supreme Court of the State of Connecticut was entered on June 1, 1982. A timely motion to reargue was denied on June 16, 1982, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES,

AMENDMENT XIV:

Section 1. . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONNECTICUT GENERAL STATUTES,

SECTION 53a-48(a):

Sec. 53a-48(a). Conspiracy. Renunciation. (a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.

SECTION 53a-122(a)(2):

Sec. 53a-122(a)(2). Larceny in the first degree: Class B felony. (a) A person is guilty of larceny in the first degree when: (2) the value of the property or service exceeds two thousand dollars.

SECTION 53a-123(a)(2):

Sec. 53a-123(a)(2). Larceny in the second degree: Class D felony. (a) A person is guilty of larceny in the second degree when: (2) the value of the property or service exceeds five hundred dollars.

SECTION 53a-40(b):

Sec. 53a-40(b). Persistent offender: Definitions; defense; authorized sentences. (b) A persistent felony offender is a

person who (1) stands convicted of a felony; and (2) has been, prior to the commission of the present felony, convicted of and imprisoned under an imposed term of more than one year or of death, in this state or in any other state or in a federal correctional institution, for a crime. This subsection shall not apply where the present conviction is for a crime enumerated in subdivision (1) of subsection (a) and the prior conviction was for a crime other than those enumerated in subsection (a).

SECTION 53a-40(f):

Sec. 53a-40(f). When any person has been found to be a persistent felony offender, and the court is of the opinion that his history and character and the nature and circumstances of his criminal conduct indicate that extended incarceration will best serve the public interest, the court in lieu of imposing the sentence of imprisonment authorized by section 53a-35 for the crime of which such person presently stands convicted, may impose the sentence of imprisonment authorized by said section for the next more serious degree of felony.

SECTION 53-29:

Sec. 53-29. ATTEMPT TO PROCURE MISCARRIAGE. Any person who gives or administers to any woman, or advises or causes her to take or use anything, or uses any means, with intent to procure upon her a miscarriage or abortion, unless the same is necessary to preserve her life or that of her unborn child, shall be fined not more than one thousand dollars or imprisoned in the State Prison not more than five years or both.

STATEMENT OF THE CASE

Chester Orsini, the Petitioner herein, was convicted in the Connecticut Superior Court at Middletown, on May 19, 1976, of one count of larceny in the first degree, one count of conspiracy to commit larceny in the second degree, and persistent felony offender. Upon a direct appeal, his conviction was affirmed by the Connecticut Supreme Court on June 1, 1982.

Two prosecution witnesses testified at trial that on three separate occasions in late 1974 or early 1975 they burglarized a private residence in the Town of Westbrook, Connecticut, and on all three occa-

sions stole quantities of antique firearms. One of the two witnesses testified that he sold of the weapons to Mr. Orsini, advising Mr. Orsini of their illegal source. Defense witnesses testified, on the contrary, that Mr. Orsini had purchased the firearms in a good-faith business transaction without any knowledge that they had been stolen.

Over a timely objection, the trial court instructed the jury in relevant part as follows: "Now, that sort of pretty much sums up the specific crimes, and in a moment I will be through. In other words, you will have to decide, on the basis of all the evidence presented before you, whether the State has proved, beyond a reasonable doubt, all of the elements of the crimes with which the accused is charged, as I have explained those elements to you. You will have to decide whether you believe the State's witnesses as to the commission of these crimes, and the participation of the accused, or whether you believe the testimony of the defendant's witnesses as to the defendant's innocence. In essence, it is as simple as that." (Jury Charge, Tr. p. 626)

After Mr. Orsini was convicted on the larceny and conspiracy counts, he was tried to the court on a charge of being a persistent felony offender. He was found guilty upon the basis of a 1965 Connecticut conviction for the crime of aiding and abetting the commission of an abortion in violation of §53-29 of the Connecticut General Statutes.

Affirming Mr. Orsini's conviction in this case, the Connecticut Supreme Court disapproved the quoted portion of the jury charge, but held that in the context of the entire charge to the jury the improper portion was not sufficiently prejudicial to warrant reversal. 187 Conn. at 276-77. With respect to the persistent felony offender conviction, the Connecticut Supreme Court held that the defendant on appeal had the burden of proving that his abortion conviction was obtained in violation of Roe v. Wade, 410 U.S. 113 (1973), as applied to the Connecticut law in Connecticut v. Menillo, 423 U.S. 9 (1975). The Court held that the record was ambiguous on the question of whether the person performing the abortion had been a layman

or a physician, and accordingly rules that the underlying conviction was not unconstitutional. 187 Conn. at 277-80.

REASONS FOR GRANTING THE WRIT

I

The Petitioner Was Denied Due Process of Law At His State Criminal Trial When the Court Instructed the Jury Simply to Choose Between the Comparative Credibility of Prosecution Witnesses and Defense Witnesses.

Comparative credibility instructions of the type utilized in this case had been widely condemned as violating the presumption of innocence and thus denying due process of law. E.g., United States v. Guest, 514 F.2d 777 (1st Cir. 1975); United States v. Brown, 582 F.2d 197, 201-02 (2d Cir.), cert. denied, 439 U.S. 915 (1978); United States v. Pine, 609 F.2d 106, 108 (3d Cir. 1979). As the Connecticut Supreme Court pointed out in its opinion in this case, "the flaw in such a charge is that it invites the jury to treat the matter of proof as a 'fair fight' between the prosecution and the defense

rather than as one weighted in favor of the latter by the necessity of proving guilty beyond a reasonable doubt." 187 Conn at 276. Citing United States v. Oquendo, 490 F.2d 161, 166 (5th Cir. 1974) (Gee, J., concurring).

In this particular case, there was a great likelihood of prejudice from the instruction given. The petitioner did not testify on his own behalf. The witnesses he called testified that he had, indeed, been in possession of the stolen items but claimed his possession was honest and in good faith. He relied on cross-examination of prosecution witnesses to establish his claim that he had not been involved in any way, before or after the fact, in the burglaries in question. By telling the jury that guilt or innocence should be determined upon the basis of the comparative credibility of witnesses, the Court emphasized the petitioner's failure to testify on his own behalf, implicitly calling for an adverse inference from his silence. See, e.g., United States v. Alfonso-Perez, 535 F.2d 1362 (2d Cir. 1976). On the facts of this particular

case, even viewed in the context of the entire charge, the "comparative credibility" charge given by the Court denied due process of law to the petitioner.

Because of the particular prejudice demonstrated in this case, it presents a compelling set of facts for review by this court of the "comparative credibility" jury instruction which has provoked so much adverse commentary from the lower courts.

II

The Petitioner Was Denied Due Process of Law By a Persistent Felony Offender Conviction Based Solely Upon a Prior Conviction for Violation of an Anti-Abortion Statute Which Was Unconstitutional Under the Holdings of This Court in Roe v. Wade, 410 U.S. 113 (1973), and Connecticut v. Menillo, 423 U.S. 9 (1975).

In 1965, Mr. Orsini was convicted in the Connecticut Superior Court at New Haven of aiding and abetting the commission of an abortion. That conviction was subsequently affirmed on appeal, State v. Orsini, 155 Conn. 367, 232 A.2d 907 (1967), and federal habeas corpus relief was denied, United States ex rel. Orsini v.

Reincke, 286 F.Supp. 974 (D.Conn.), aff'd 397 F.2d 977 (2d Cir. 1968). In the present case, he was charged and convicted as a persistent felony offender upon the basis only of that 1965 conviction.

In 1973, the Connecticut Abortion Statute was declared unconstitutional by the United States District Court. Abele v. Markle, 369 F.Supp. 807 (D.Conn. 1973). The ultimate authority for the declaration of unconstitutionality was, of course, this Court's ruling in Roe v. Wade, 410 U.S. 113 (1973). See generally Lady Jane v. Maher, 420 F.Supp. 318 (D.Conn.), aff'd sub nom. Maloney v. Lady Jane, 431 U.S. 926 (1976). Prior to this Court's affirmance of Lady Jane, it qualified its interpretation of the Connecticut Abortion Statute in Connecticut v. Menillo, 423 U.S. 9 (1975), holding that the statute was not unconstitutional when applied to performance of an abortion by a non-physician. In the present case, the Connecticut Supreme Court relied on Connecticut v. Menillo to affirm Mr. Orsini's persistent felony offender conviction. In doing so,

the Connecticut Supreme Court ignored the facts of its own cases and, more importantly for present purposes, misconstrued this Court's holdings in Roe, Menillo, and Lady Jane.

The Connecticut Supreme Court agreed with the petitioner "that a conviction which has been procured in violation of constitutional rights cannot be used to increase the punishment which would ordinarily be permissible." Citing Baldasar v. Illinois, 446 U.S. 222 (1980); United States v. Tucker, 404 U.S. 443 (1972); Burgett v. Texas, 389 U.S. 109 (1967); Lewis v. United States, 445 U.S. 55 (1980). The Court consulted its prior opinion in State v. Orsini, 155 Conn. 367, supra, and attempted to find a basis for suggesting that the person aided and abetted by Mr. Orsini in that case was not a physician. In its original opinion in this case, the Connecticut Supreme Court claimed that the abortion in question "was performed by the defendant's brother in a motel room...." That opinion was subsequently amended to strike the claim that Mr. Orsini's brother had been involved, when it was pointed out to the Supreme Court that its own previous

decision had expressly stated that the abortion was performed by an individual from Trenton, New Jersey, known in the State of New Jersey as "Dr. Walker". In fact, as is made clear in the original Orsini opinion at 155 Conn., there is no indication one way or the other respecting the physician status of the individual Orsini had assisted although there are some indications that the individual was considered to be a physician.

What the Connecticut Supreme Court ignored, however, was that Mr. Orsini was not charged with or convicted of aiding in the performance of an abortion by a non-physician. Evidence was not presented at his trial to show that the individual performing the abortion was not a physician and there is no such allegation in the pleadings. Accordingly, he was convicted of a charge which was invalid on its face and invalid under the evidence as presented.

As the Connecticut Supreme Court itself noted, the silence of the record with respect to a constitutional question raised by an underlying conviction in a persistent

felony offender prosecution is sufficient to invalidate a persistent felony offender conviction. Citing Burgett v. Texas, supra, at 114-15. State v. Orsini, 187 Conn. at 279. The Connecticut Supreme Court ignored its own observation respecting the prior holdings of this Court, and ruled that since there was no evidence on the record of the underlying conviction to indicate whether it was obtained under constitutionally permissible or constitutionally impermissible circumstances, the Court would presume that the facially invalid statute was applied in a lawful manner. Such a presumption is utterly unwarranted and is not authorized by any applicable case law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Connecticut.

Respectfully submitted,

JOHN R. WILLIAMS
265 Church Street
New Haven, Ct. 06510
(203) 562-9931

DATED: June , 1982

APPENDIX A

S U P R E M E COURT

STATE OF CONNECTICUT v. CHESTER ORSINI

PETERS, HEALEY, PARSKEY, SHEA and F. HENNESSY, Js.

Argued March 4-decision released June 1, 1982

Convicted of the crimes of larceny in the second degree, of conspiracy to commit larceny in the second degree and of being a persistent felony offender, the defendant appealed. Held:

1. The defendant was not deprived of any constitutional right by the trial court's refusal to allow his attorney, on cross-examination of two of the state's witnesses, to inquire as to acts of prior misconduct on their part; more, the defendant having failed to except to that refusal at trial, it was not further reviewable by this Court.

2. The defendant's failure to request a change of venue before trial precluded any review of his claim of improper venue.

3. The redundant wording of the count of the information which charged the defendant with conspiracy did not nullify his conviction of that offense since he failed to seek a correction of the defect and since the trial court thoroughly explained the elements necessary for a conspiracy conviction in its charge to the jury.

4. The trial court did not err in charging the jury that, with respect to a four day discrepancy between the date of the larceny alleged in the information and the date alleged in the bill of particulars, it could find the defendant guilty if the evidence proved that he had committed the crime within the "general area" of those two dates.

5. The trial court's instruction to the jury that "[y]ou will have to decide whether you believe the state's witnesses as to the commission of these crimes... or whether you believe the testimony of the defendant's witnesses as to the defendant's innocence. . . . ," when read in the context of the entire charge, could not reasonably have resulted in a dilution of the state's burden of proof.

6. There was nothing in the record to indicate that the defendant was deprived of a fundamental constitutional right as a result of his conviction of being a persistent felony offender.

Information charging the defendant with three counts of larceny and three counts of conspiracy to commit larceny, brought to the Superior Court in the judicial district of Middlesex and tried to the jury before Naruk, J.; verdict and judgment of guilty of larceny in the second degree under the first count and conspiracy to commit larceny in the fourth degree under the sixth count; the court found the defendant guilty of being a persistent felony offender; from the judgment rendered the defendant appealed to this court. No error.

John R. Williams, for the appellant (defendant).

Robert E. Beach, Jr., special assistant state's attorney, for the appellee (state).

SHEA, J. The defendant was convicted of larceny in the second degree in violation of General Statutes §53a-123(a)(2) and

also of conspiracy to commit larceny in the second degree in violation of General Statutes §53a-48 after a jury trial. In a later proceeding he was also found guilty of being a persistent felony offender in violation of General Statutes §53a-40(b). In his appeal from the judgment the defendant claims (1) that his right of cross-examination was unconstitutionally infringed by rulings which sustained objections to his questions concerning the prior misconduct of two witnesses for the state; (2) that his convictions are invalid because of improper venue; (3) that his conviction of conspiracy is a nullity because of a defect in the wording of that count of the information; (4) that two comments made by the trial judge in the course of the charge to the jury were improper and prejudicial; (5) that his conviction as a persistent felony offender under the second part of the information, in accordance with the procedure set forth in Practice Book §619, is vitiated by the fact that the previous felony relied upon was a violation of General Statutes §53-29, which prohibits anyone from assisting in procuring an abortion and, the defendant maintains,

was implicitly declared unconstitutional in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). See Abele v. Markle, 369 F.Supp. 807 (D.Conn. 1973); State v. Menillo, 168 Conn. 266, 362 A.2d 962, vacated, 423 U.S. 9, 96 S.Ct. 170, 46 L.Ed.2d 152 (1975), on remand, 171 Conn. 141, 368 A.2d 136 (1976); and (6) that his trial attorney[1] was so inept that the defendant was deprived of the effective assistance of counsel. We find no error sufficient to warrant a new trial and we affirm the judgment.

Although no claim that the evidence was insufficient to support the findings of guilty has been raised, a brief summary of the facts which might reasonably have been found in support of the verdicts furnishes a useful background for evaluation of the defendant's claims. In late December one Morris Ashcroft and two companions broke into a home in Westbrook and removed

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[1]At the trial the defendant was represented by a different attorney from the one who represented him on this appeal.

several antique guns from a chest in the basement. Through an intermediary, Ashcroft met the defendant at a gas station in Westbrook and sold him the guns for $300, informing him that they were stolen and narrating the circumstances of the burglary.

Several days afterward Ashcroft re-entered the same house in Westbrook and took some more guns. He telephoned the defendant and arranged to meet him at a store in Westbrook, telling him he had stolen some other guns from the same place. When they met, the defendant purchased these guns for $500.

A week or two later Ashcroft, this time with one companion, stole some rifles[2] as well as other items from the Westbrook residence. The defendant met Ashcroft at a restaurant in Meriden as a result of a telephone conversation and he bought the rifles for $800. At this meeting Ashcroft signed a receipt indicating a price of $2500 for the rifles. There was testimony that all of the stolen guns, which were

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[2]The guns previously stolen were presumably pistols.

admitted in evidence at the trial, had a value of $13,295.

I

During oral argument the defendant focused mainly upon the rulings of the court made during the cross-examination of two witnesses for the prosecution who had participated with Ashcroft in burglarizing the house in Westbrook. Each of them was asked whether he had broken into any other houses in the Westbrook area with Ashcroft and objections by the state were sustained. No exceptions to the rulings were taken as required by Practice Book §288. Faced with this obstacle to review of the rulings, the defendant argues that precluding him from this inquiry into the prior misconduct of these witnesses was an error of constitutional dimension falling within the exception created by State v. Evans, 165 Conn. 61, 327 A.2d 576 (1973), for such situations.

The defendant relies upon the holding of Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), that undue restriction upon cross-examination of prosecution witnesses for bias or interest, particularly with respect to bargains made

concerning the disposition of criminal charges against those witnesses, violates the constitutional rights of confrontation. See State v. Annunziato, 174 Conn. 376, 279, 287 A.2d 566 (1978). That principle is wholly inapplicable to the questions which are the subject of the rulings challenged here. Not only do these inquiries make no reference to pending criminal charges against the witnesses, whether formally presented or at some preliminary stage, but no claim of such a purpose was made at trial. Facially the questions appeared to be designed to attack the character of the witnesses by proof of prior specific acts of misconduct other than felony convictions in violation of the general prohibition against such evidence. State v. Zdanis, 173 Conn. 189, 191, 377 A.2d 277 (1977); State v. Martin, 170 Conn. 161, 167, 365 A.2d 104 (1976); Richmond v. Norwich, 96 Conn. 582, 597, 115 A.11 (1921); Verdi v. Donahue, 91 Conn. 448, 454, 99 A. 1041 (1917). The exception, which allows, in the discretion of the trial court, proof of particular acts having a special significance upon the

issue of veracity, cannot be said to require the admission of evidence that a witness has engaged in an unrelated burglary at some time in the past. Vogel v. Sylvester, 148 Conn. 666, 675, 174 A.2d 122 (1961); Shailer v. Bullock, 78 Conn. 65, 69 (1905). The exclusion of such evidence, therefore, does not deprive the defendant of any constitutional right and the ruling is not further reviewable because of the absence of any exceptions. Practice Book §288. The defendant was not inhibited by these rulings from exploring the motivations of the witnesses for testifying in relation to the disposition of any pending criminal charges, inquiries which were in fact vigorously pursued at trial without restriction.

II

The claim of improper venue has also been raised for the first time in this appeal rather than in the trial court.[3]

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[3]The defendant claimed that venue was improper because the bill of particulars alleged that the larceny charged in the first count of the information occurred in Meriden, which is situated within the county of New Haven. Each of the six counts

Venue requirements are created for the convenience of the litigants and may be waived by failure to assert the statutory privilege in timely fasion. 77 Am.Jur.2d, Venue §45. Subject matter jurisdiction, which cannot be conferred upon the court by the parties, must be distinguished from venue. Ibid.; Fine v. Wencke, 117 Conn.

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of the original information stated that the place of the crime was Westbrook in Middlesex County. The evidence was that the guns were stolen from a house in Westbrook and were delivered to the defendant in Meriden as a result of meetings with the defendant in Westbrook. General Statutes §54-77 (Rev. to 1977) provided in part that "when theft is committed in one county or judicial district and the property stolen is carried into another county or judicial district, the offender may be tried in either county or judicial district." The defendant concedes that he could have been tried in either New Haven County or Middlesex County, but maintains that once the bill of particulars was filed indicating that the larceny charged in the first count had occurred in Meriden, that amendment to the information required that the trial of that count be held in New Haven County. Our view that this claim involves neither jurisdiction nor a violation of a fundamental constitutional right makes it unnecessary to consider its merits further.

683, 684, 169 A.58 (1933); Mower v. State Department of Health, 108 Conn. 74, 77, 142 A.473 (1928). Practice Book §§809 and 810 provide that a request for transfer of prosecution must be made before trial or shall otherwise be deemed to be waived. General Statutes §54-1d expressly provides that "[a] criminal cause shall not fail on the ground that it has been submitted to a session of improper venue."

Recognizing the necessity of converting his statutory venue privilege into a constitutional right for the purpose of obtaining appellate review of the venue error claimed, the defendant, during oral argument, though not in his brief, advanced the proposition that venue in a criminal case invokes the fundamental right of trial by jury which is not waivable except at the express election of the defendant personally in open court. See Roseman v. United States, 364 F.2d 18, 27 (9th Cir. 1966), cert. denied, 386 U.S. 918, 87 S.Ct. 880, 17 L.Ed.2d 789 (1967); Hawkins v. United States, 385 A.2d 744, 747 (D.C. App. 1978); Russell v. State, 342 So.2d 96, 97 (Fla. App. 1977). The basis for this position is that at common

law a jury must generally have come from the vicinage or neighborhood where the crime occurred, a rule emanating from the character of the ancient jury as a body of people from the immediate area of the crime having some acquaintance with the persons and events involved who could rely upon their previous knowledge in reaching a verdict. 47 Am.Jur.2d, Jury §25. This conception of jurors as being informed about a case prior to trial is, of course, at variance with our present view that a verdict must be based solely upon the evidence presented at trial. United States v. Howard, 506 F.2d 865, 867 (5th Cir. 1975); State v. McCall, 187 Conn. 73, A.2d (1982). Even if the defendant were entitled to a jury composed of jurors from New Haven County rather than from Middlesex County, as he contends, we are not convinced that this privilege, which is wholly statutory in origin, is so fundamental that it may not be waived without the full panoply of safeguards applicable to a plea of guilty or an election of a trial without a jury.[4] We are not aware

[4]Article VI of the United States Constitu-

of any authority supporting this claim of the defendant and we are not inclined to begin a parade of precedent in that direction. We conclude that the failure to request a change of venue before trial precludes any review of the defendant's claim of improper venue on its merits.

III

The defect in the wording of the information which is claimed to nullify his conviction of conspiracy was raised in the trial court by the defendant during his argument of a motion for acquittal[5] at the close of the evidence presented by the state. The sixth count of the information, charging the crime of conspiracy upon which a guilty verdict was rendered, alleged that the defendant "did combine, conspire, confederate and agree with [others] to commit the crime of conspiracy to Commit Larceny

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tion provides in part that "the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed...."

[5]The defendant erroneously referred to this motion as a motion to dismiss. See Practice Book §§ 815, 884.

in the Second Degree...in violation of Sections 53a-48(a) and 53a-123(a)(2) of the Penal Code." As the defendant maintains, there is no such crime as a conspiracy to conspire to commit some offense. Although a motion for a bill of particulars was addressed to this count before trial seeking "the exact date, time and place" of the alleged conspiracy and a response thereto was filed, no pretrial motion was made pointing to this defect in the wording of the information as required. Practice Book §809(1). The failure to raise a defect in the information before trial by a motion to dismiss upon that ground constitutes a waiver thereof. Practice Book §§890(1), 810, 815(2). It does not appear that the defendant sought any correction of the information when he called the deficiency to the attention of the trial court in arguing for an acquittal. In denying his motion the court noted that "there is a sort of redundancy..." in the wording of this count but concluded that the statutory references made clear which crime was charged and that there had been no surprise or prejudice. Practice Book §625 implicitly allows an information to charge an

offense by referring only to the statute which has been violated, but requires the prosecutor to amend it by a statement of the essential facts constituting the crime upon the written request of a defendant. No such request was made in this case, and, as previously mentioned, the motion for a bill of particulars sought only the time and place of the conspiracy.

In instructing the jury upon this count of the information the trial court did read the information without comment upon the error in wording which had been observed. The court summarized this count, however, as charging the defendant "with having committed the crime of conspiracy to commit larceny in the second degree..." and thoroughly explained the elements necessary for a conviction. No error is claimed in this portion of the charge. We conclude that the defect in the information was waived by the failure of the defendant to seek a correction of it and that, in any event, he was not prejudiced because the crime of which he was convicted was adequately explained in the charge.

IV

The errors claimed in the charge to the jury are the instructions on (1) the significance of the date of the crime as alleged in the information and (2) the choice to be made in deciding whether to believe the witnesses for the prosecution or those for the defense.

A

The first count of the information alleged that the defendant committed larceny in the first degree "on or about the 3rd day of January, 1975...." The bill of particulars, filed in response to a motion of the defendant, specified that "on or about January 7, 1975 . . . " the defendant had purchased some antique guns in Meriden knowing that they had been stolen. The trial court noted this discrepancy between the dates of the crime as alleged in the information and in the bill of particulars and instructed the jury as follows: "Now, as far as the date of the crime is concerned, as to these two dates, --the law does recognize that if the evidence proves the crime within that general area, so there is no element of surprise,

so it is on the particular date that is given, it really doesn't matter whether it is the specific date that is given. So I would suggest to you that you not overemphasize these two dates." No exception was taken to this portion of the charge as required by Practice Book §854.

Once again the defendant seeks review of a claimed error despite his failure to preserve it in the trial court for presentation on appeal. He claims that his constitutional right "to be informed of the nature and cause of the accusation" as provided by the Sixth Amendment of the Constitution of the United States was infringed by the court's instructions. It is essential that an information comply with this requirement in order that a defendant may be able to prepare for trial and, after judgment, be able to plead that record in bar of a further prosecution for the same offense. Wong Tai v. United States, 273 U.S. 77, 80, 47 S.Ct. 300, 71 L.Ed. 545 (1927). The defendant's claim is, therefore, reviewable to determine whether this constitutional right of his was violated. State v. Evans, supra. Our

first observation is that the import of the language used by the trial court is not entirely clear. A fair construction would be that the jury might find the defendant guilty if he committed the crime charged at any time within the "general area" of the two dates, encompassing the period January 3 to January 7 and perhaps extending for some reasonable period beyond these limits.

"It is a well-established rule in this state that 'it is not essential in a criminal prosecution that the crime be proved to have been committed on the precise date alleged, it being competent ordinarily for the prosecution to prove the commission of the crime charged at any time prior to the date of the complaint and within the period fixed by the Statute of Limitations.' State v. Lorusso, 151 Conn. 189, 191, 195 A.2d 429 [1963]." State v. Ramos, 176 Conn. 275, 276-77, 407 A.2d 952 (1978). Time is not usually an essential element of an offense. Ibid.; State v. Hauck, 172 Conn. 140, 150, 374 A.2d 150 (1976). Where the lack of a sufficiently definite date is deemed to implicate the right to know the nature of the charge made, actual

prejudice in the preparation or presentation of the defense has been found. In the cases cited by the defendant for this proposition, however, the time alleged has been far more indefinite than the expanded time period sanctioned by the trial court here. United States v. Parente, 449 F. Supp. 905, 914 (D.Conn. 1978); Commonwealth v. Devlin, 333 A.2d 888, 892 (Pa. 1975). The defense in this case was not that the sale of the guns to the defendant had not taken place but that the defendant was not aware that the guns were stolen. The defendant has not pointed out how he was prejudiced in making his defense by the challenged instruction. We are not dealing with an erroneous charge upon an essential element of an offense. See Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L.Ed.2d 39 (1979); State v. Rose, 169 Conn. 683, 688, 363 A.2d 1077 (1975). The broadening of the time period alleged for the commission of the crime which the trial court effectively permitted had no adverse impact upon the defendant sufficient to constitute a deprivation of his constitutional right "to be informed of the nature and cause of the accusation...."

B

The defendant did take exception to the portion of the charge relating to the comparative credibility of the prosecution and defense witnesses, though not very clearly.[6] In its summary near the end of the charge, the court advised the jury that they must decide whether the state had proved all the elements of the crimes involved beyond a reasonable doubt. Then followed the challenged instruction: "You will have to decide whether you believe the state's witnesses as to the commission of

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[6]The colloquy concerning the defendant's exception to the charge was as follows:

"MR. ZACCAGNINO: Yes, Your Honor. Just one thing I want to ask Your Honor, you could think about, Your Honor charged, in the last statement you made just before you started to tell them about the deliberations, were in this context, 'If you believe the state's witnesses, you'--something about 'guilty'--you went on to say, 'Or you can believe the defendant's witnesses that tended to prove his innocence.' That might give the opinion that we have to prove that. And we don't have to [do] anything, if they haven't made out a prima facie case.

"THE COURT: I think, considering the whole charge, in that context, that was clear in the beginning.

"MR. ZACCAGNINO: I thought I would bring

these crimes, and the participation of the accused, or whether you believe the testimony of the defendant's witnesses as to the defendant's innocence. In essence, it is as simple as that." Instructions similar to these have been termed "comparative credibility" charges and have been widely criticized. United States v. Pine, 609 F.2d 106, 108 (3d Cir. 1979); United States v. Brown, 582 F.2d 197, 201-202 (2d Cir.), cert. denied, 439 U.S. 915, 99 S.Ct. 289, 58 L.Ed.2d 262 (1978); United States v. Guest, 514 F.2d 777, 780 (1st Cir. 1975). The flaw in such a charge is that it invites the jury to treat the matter of proof as a "fair fight" between the prosecution and the defense rather than as one weighted in favor of the latter by the necessity of proving guilty beyond a reasonable doubt. United States v. Oquendo, 490 F.2d 161, 166 (5th Cir. 1974) (Gee, J., concurring).

The question before us is not whether

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that out.

"THE COURT: The problem was balancing of the testimony."

this single statement, viewed in isolation from the rest of the charge, can reasonably be regarded as diluting the burden of proof resting upon the state, but whether in the context of the entire charge it can be said to have had that result. A charge cannot be critically dismembered but must be read as a whole. State v. Crawford, 172 Conn. 65, 69, 372 A.2d 154 (1976). We have frequently in recent years faced a similar problem in analyzing the effect of the instruction that a person is "presumed" to intend the natural consequences of his acts, which was disapproved in Sandstrom v. Montana, supra, as potentially shifting the burden of proof on the issue of intent to the defendant. See, e.g., State v. Cosgrove, 186 Conn. 476, 481, 442 A.2d 1320 (1982). Our approach has been to examine the entire charge to determine whether there is any reasonable basis for concluding that the objectionable portion might have had such effect. Ibid. A similar analysis has been applied to the problem created by a "comparative credibility" instruction. United States v. Pine, supra; United States v. Brown, supra.

Here the trial judge repeatedly stressed that the state had the burden of proving each element of the crimes charged beyond a reasonable doubt. He also advised the jury that the defendant was not obliged to prove his innocence and that no inference could be drawn from his failure to testify. In the context of the entire charge, which occupies forty pages of the appendix to the defendant's brief, the isolated statement under fire cannot reasonably be said to have had any potential for lessening the burden of the state or imposing a burden upon the defendant. United States v. Brown, supra, 202.

V

The defendant claims next that his conviction as a persistent felony offender is invalid because the earlier offense relied upon is based upon a statute subsequently declared unconstitutional. Although no such issue was raised in the trial court, it does involve a violation of a constitutional right reviewable upon the trial record. See State v. Evans, supra. The second part of the information charged that the defendant was a persistent felony

offender in violation of General Statutes §53a-40(b) by virtue of his conviction on December 10, 1965 for aiding and abetting an abortion in violation of General Statutes §53-29. See United States ex rel. Orsini v. Reincke, 286 F.Supp. 974 (D. Conn.), aff'd, 397 F.2d 977 (2d Cir. 1968); State v. Orsini, 155 Conn. 367, 232 A.2d 907 (1967). The effect of a conviction as a persistent felony offender is to allow the imposition of a greater term of imprisonment than would otherwise be authorized for the crime committed. General Statutes §53a-40(f).

We accept the basis premise advanced by the defendant that a conviction which has been procured in violation of constitutional rights cannot be used to increase the punishment which would ordinarily be permissible. Baldasar v. Illinois, 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed.2d 169, reh. denied, 447 U.S. 930, 100 S.Ct. 3030, 65 L.Ed.2d 1125 (1980); United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L. Ed.2d 592 (1972); Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967); cf. Lewis v. United States, 445

U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980). The question remains whether the defendant's former conviction for aiding and abetting an abortion in violation of General Statutes §53-29 was invalid.

The decision in Roe v. Wade, supra, striking down in its entirety a Texas abortion statute similar to General Statutes §53-29 was initially thought to invalidate that statute wholly and to render it a nullity. Abele v. Markle, 369 F.Supp. 807, 809 (D.Conn. 1973); State v. Menillo, 168 Conn. 266, 269, 362 A.2d 962, vacated, 423 U.S. 9, 96 S.Ct. 170, 48 L. Ed.2d 152 (1975), on remand, 171 Conn. 141, 368 A.2d 136 (1976); State v. Sulman, 165 Conn. 556, 558, 339 A.2d 62 (1973). That view of the effect of Roe v. Wade subsequently proved to be unwarranted, when the United States Supreme Court in Connecticut v. Menillo, 423 U.S. 9, 96 S. Ct. 170, 46 L.Ed.2d 152 (1975), corrected the misleading impression that the broad language of the Roe opinion had created by circumscribing its effect more precisely. In remanding for further consideration the court stated expressly that "prosecutions for abortions conducted by nonphysicians

infringe upon no realm of personal privacy secured by the Constitution against state interference." Connecticut v. Menillo, supra, 11. Upon our reconsideration of the case it was held that the conviction of the nonphysician abortionist involved should be upheld. State v. Menillo, 171 Conn. 141, 368 A.2d 136 (1976).

The defendant maintains that the record is silent upon whether the person whom he was found guilty in 1965 of aiding to commit an abortion was a physician. The facts stated in the opinion of this court affirming that conviction contain no suggestion that any physician participated in the abortion and imply the contrary. The abortion was performed by the defendant's brother in a motel room with an implement described as a "shoehorn device" while the defendant fed the woman some pills. State v. Orsini, supra, 370. In those cases where the use of an earlier conviction has been prohibited, there has been some indication in the record, e.g., the absence of a notation of the appearance of counsel, which raised a presumption that a constitutional right had been violated. Burgett v. Texas, supra, 114-15.

We may infer from the failure of the defendant to raise the issue below in a trial which took place about one year after the clarification of the effect of Roe v. Wade, supra, by the opinion in Connecticut v. Menillo, supra, that there was no ground for attacking his prior conviction upon the basis now proposed. In any event our review of claims not seasonably brought to the attention of the trial court is limited, even when constitutional considerations are involved, to those instances where the record clearly demonstrates a deprivation of a fundamental constitutional right. State v. Evans, supra. The record contains no indication of such a situation in this case.

VI

The final claim of the defendant is that he did not receive the effective assistance of counsel at trial. As he recognizes in his brief, we are reluctant to resolve this kind of claim upon a direct appeal rather than after a habeas corpus proceeding where facts and circumstances often not disclosed by a trial transcript can be fully developed and the

lawyer who represented the defendant at trial can be heard from. State v. Mason, 186 Conn. 574, 578-80, 442 A.2d 1335 (1982); State v. Just, Conn. (43 Conn. L.J., No. 7, pp. 19, 29) (1981); State v. Barber, 173 Conn. 153, 154-55, 376 A.2d 1108 (1977). Our review of the deficiencies of trial counsel claimed here indicates no malfeasance so egregious that we would be warranted in deviating from our usual practice.

There is no error.

In this opinion the other judges concurred.

NO. 9389

STATE OF CONNECTICUT	:	SUPREME COURT
VS.	:	STATE OF CONNECTICUT
CHESTER ORSINI	:	JUNE 4, 1982

MOTION TO REARGUE

Pursuant to Sections 3111, et seq., of the Practice Book, the defendant respectfully moves to reargue the appeal in this case, for the following reasons:

1. Among the grounds raised on the appeal, and the Fifth ground discussed by this Court in its opinion filed June 1, 1982, was the defendant's claim "that his conviction as a persistent felony offender is invalid because the earlier offense relied upon is based upon a statute subsequently declared unconstitutional." 187 Conn. at 277.

2. In finding no error on that issue, this Court relied heavily upon a belief that the facts recited in this Court's opinion in the earlier case, State v. Orsini, 155 Conn. 367, 232 A.2d 907 (1967), "contain no suggestion that any physician participated in the abortion and imply the contrary. The abortion was performed by the defendant's brother in a

motel room...."

3. This Court's belief, quoted above, was mistaken. The opinion of the Court, 232 A.2d at 909, expressly states that the abortion was performed by Anthony Salvatore. The Court's opinion contains no suggestion that Mr. Salvatore was in any way related to the defendant and in fact he was not related to the defendant. He most emphatically was not the defendant's brother. Moreover, although the opinion is entirely silent as to whether or not Salvatore was a physician, the opinion states that Salvatore was originally contacted in Trenton, New Jersey and that in New Jersey he was known as "Dr. Walker". The implication is that he was a physician.

4. The opinion of the Court in the present case further states, at page 279, that the "abortion was performed...with an implement described as a 'shoehorn device' ...." To the extent that the quotation implies the use of implements other than standard medical ones, it appears to be somewhat misleading. It is apparent from a reading of Chief Justice King's opinion for the Court that the woman upon whom the

abortion was performed attempted at trial to describe in obviously a lay fashion the instruments used. The opinion states that she testified to the effect that "Salvatore inserted a sort of shoehorn device in her vagina and then a sort of long cue-tip instrument with medication on it." It was never suggested that the abortion had been performed with a shoehorn.

5. It is respectfully submitted that the erroneous factual recitations contained in this Court's opinion at page 279 form a material part of the basis for the Court's ruling and should be corrected. Upon such a correction, it is further submitted, the Court's holding on that claim should be reconsidered and the appeal should be sustained on that ground.

THE DEFENDANT-APPELLANT

BY _____
JOHN R. WILLIAMS
His Attorney

Service certified per P.B.

NO. 9389

STATE OF CONNECTICUT : SUPREME COURT

VS. : STATE OF CONNECTICUT

CHESTER ORSINI : JUNE 16, 1982

O R D E R

The Defendant's Motion to Reargue having been presented to the court, it is hereby ORDERED DENIED.

BY THE COURT,

Donald H. Dowling
Chief Clerk

SUPREME COURT OF CONNECTICUT

DONALD H. DOWLING
REPORTER OF
JUDICIAL DECISIONS

DRAWER N, STATION A
HARTFORD 06106

16 June 1982

John R. Williams, Jr., Esq.
265 Church St.
New Haven, CT 06510

Robert E. Beach, Jr., Esq.
Special Assistant State's Attorney
100 South Turnpike Rd.
P.O. Box 5000
Wallingford, CT 06492

Re: State of Connecticut v. Chester Orsini, 187 Conn. 264 (1982)

Gentlemen: [John]

Please be advised that the court this date denied the defendant's motion to re-argue in the above-entitled matter.

The court did, however, suo motu, amend its opinion by substituting for the third sentence in the first full paragraph of 187 Conn. 279, the following:

The abortion was performed by a person who used the name of "Dr. Walker" as an alias in a motel room with an implement described as a "shoehorn device" while the defendant fed the woman some pills.

Very truly yours,

Donald H. Dowling

APPENDIX TO
BRIEF OF THE DEFENDANT

THE COURT: As you know, ladies and gentlemen, we have now come to that part of the trial where it becomes my duty to instruct you as to the law which you are to apply in arriving at your verdict.

In the trial of this case, as in the trial of all jury cases, you and I have separate functions to perform. It is my duty to state the rules of law involved in the decision of this case, and yours to find the facts. Insofar as I state the law to you, what I say to you is binding upon you, and you understand if what I state to you differs from what counsel stated in argument, you will dismiss from your minds what they or either one of them may have said. You will also dismiss any of your own personal notions as to what you think the law is or ought to be. As I told you before, the simple reason for this is that what I say is taken down by the court reporter, and if I make a mistake, that mistake is subject to correction by an appellate court. If you apply some different rule of the law, different

than what I state to you, we will never know whether the rule you applied was the correct one or not, because of the secrecy of the jury deliberations, and that mistake, if any is made, is never subject to correction.

Now, counsel have commented, during the course of their arguments, on the question of objections and rulings on evidence, and I instructed you during the course of the trial, that where I sustained an objection to evidence or ordered evidence stricken, that you would disregard that evidence and treat it as having not been in the case, and I would just remind you again of my earlier comments to you.

I also want to remind you of something else that you were told at the outset of this case, and that is that in this case there are two separate counts now -- there originally were six -- which are joined together as a matter of convenience. That is to say, because they arise out of the same series of transactions, involving the same witnesses, they were put together in the same information, to be tried at the same time, rather than have separate

trials. That is strictly a matter of convenience, and as far as the two counts that are remaining in this case are concerned, you will treat them separately, and you will consider the evidence as to the two of them in accordance with the instructions I give you, but at all times you must remember that the general rules that I give you apply to both counts, and the same considerations should be taken into account equally as to both counts in the application of these rules.

Now, the performance of my duty, of course, requires that I state to you the rules of law lying at the foundation of the various claims of the State and this defendant. These rules, when applied to the facts which you will find, will lead you to your ultimate verdict.

Now, it may also require that I point out to you the legal effect of certain facts or certain evidence or suggest to you certain considerations which you should bear in mind in considering the evidence. Now, when I assume to do either of these things, you will carefully heed what I say. Now, I do not

intend to go into the facts extensively in this case. My chief concern with the facts in the case will be to refer to them only in an attempt to make clear to you the application of the rules of law to this case. That is to say, where I am discussing a particular rule of law that may deal with a particular piece of evidence, I will refer, perhaps, to that piece of evidence, but I don't mean by that to exclude anything else that is to be considered here. If I refer to certain evidence or certain facts in the case which you may find to be proven, or which you may infer, and not to others, you are not to think that I mean thereby to particularly emphasize the particular facts I speak of or to limit your consideration to them as contrasted to the facts I do not refer to. If I overlook any evidence in the case, you will supply it from your own recollection. If I incorrectly state any evidence, you will correct my error, for, after all, it is your obligation to make the proper deductions or inferences from it, and to determine the facts. And what counsel or I may say to you as to the facts, except

as I have already pointed out, should have weight with you only insofar as you approve it in your own minds.

Now, there are two types of evidence from which you may find the truth as to the facts in most cases, including this case, and that is direct evidence and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of the facts, such as an eye witness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of the accused. Now, the law makes no distinction between the weight to be given to either direct or circumstantial evidence, nor is any greater degree or extent of proof required of circumstantial evidence than on direct evidence. You should weigh all of the evidence in the case and arrive at your conclusions by the direct or circumstantial evidence. In other words, one has no greater weight than the other.

Next I want to point out to you that in this case, as in all criminal cases, the accused is presumed to be innocent until he is proven guilty. That means that

at the moment when this defendant was presented for trial before you, nothing that you knew or might surmise or guess about his past should be considered by you at all; that his slate was wiped clean at that moment in time; that he stood before you free from any bias, prejudice, or burden arising from his position as the accused; and that so far as you were concerned, he then was innocent, and that he continues innocent until such time as the evidence and the matters produced here in the orderly conduct of the trial, satisfy you that he is guilty. Up to the moment when you are so satisfied, from what has taken place here in court before you -- that is, to show that he is guilty -- so far as you are concerned, he is innocent of these crimes with which he is charged, or with any one of them.

The State does not desire the conviction of innocent persons or of any person of whose guilty there is a reasonable doubt, based upon the evidence presented. The State has as much interest in having an innocent person acquitted as in having a guilty person punished. But for the

safety and well-being of our society and the protection of the lives of the citizens, the State is concerned in seeking the conviction of persons who have been proven, beyond a reasonable doubt, to be guilty of such crimes as are charged in this information. It is the sworn duty of courts and jurors to safeguard the rights of persons charged with crime by respecting the presumption of innocence which the law imputes to every person so charged. But the law is made to protect society and innocent persons, and it is not made to protect those legally found to be guilty. If and when the presumption of innocence has been overcome by evidence proving, beyond a reasonable doubt, that the accused person is guilty of the crime charged, then it is the sworn duty of the jury to enforce the law and to render a verdict of guilty.

The burden, then, is upon the State to prove the accused guilty of the crime or crimes with which he is charged. He does not have to prove his innocence. That means the State must prove every element necessary to constitute that particular crime or crimes, as I shall explain these

elements to you a little later on concern-these two counts. It is not enough for the State to prove only part of those elements, for if proof of even one of them is lacking, you must find the accused not guilty.

As I shall later charge you, under the information in this case, the accused may be found guilty of either of two crimes, or of both, and you must remember, as respects any one of them, the State must prove every element necessary to its commission. The State can sustain its burden of proof resting upon it only if the evidence before you establishes the existence of every element constituting such crime, beyond a reasonable doubt.

Now, needless to say, the fact the accused has been arrested and charged with the commission of a crime and placed on trial before you is not to be held in any way against him or to be treated as evidence. Therefore, the information, which you will have in the jury room with you, is only to be considered as a list of charges -- not as evidence in the case, as such.

Now, as I said a moment ago, before you can return a verdict of guilty, the State must prove every essential element of the crime or crimes charged beyond a reasonable doubt. Now, this phrase "reasonable doubt" has no technical or unusual meaning. You get the real meaning of the phrase if you emphasize the word "reasonable". A reasonable doubt is a doubt for which a valid reason can be assigned. It is a doubt which is something more than a mere guess or surmise. A reasonable doubt is not such a doubt as is raised by one who questions simply for the sake of argument. It is not a doubt suggested by the ingenuity of counsel which is not supported by the evidence. A reasonable doubt is a real doubt, an honest doubt -- that is, a doubt which has its foundation in the evidence offered in the case or in the lack of evidence that has been offered in the case. Absolute certainty in the affairs of life is almost never attained, and the law does not require absolute certainty on the part of a jury before it returns a verdict of guilty. In other words, ladies and gentlemen, the law does not require one hundred

percent proof of guilt. What the law does require, however, is that if, after hearing all of the evidence, there is something in that evidence or in the lack of evidence which leaves in your minds, as the jury and as reasonable men and women, a reasonable doubt of the guilt of the accused, then the accused must be given the benefit of that doubt and acquitted.

Now, it necessarily follows from that that if any fact or any element points equally two ways, one towards innocence and the other towards guilt, then it must be given that direction which tends towards innocence. In other words, it is incumbent upon the State to negative every hypothesis not, in itself, unreasonable or improbable, which is consistent with the innocence of the accused. If you can, in reason, reconcile all of the facts proven with any reasonable theory consistent with the innocence of the accused, then, of course, you cannot find him guilty.

Now, in performing your function, one of the things which you have to do is to pass upon the credibility of the various witnesses who have appeared here before

you. In passing on the credibility of each of the witnesses, there are certain considerations which you may well keep in mind. One of these is the appearance which the witness made when he was on the stand. Did he appear to be telling the truth? Did he appear to be honest? Did he appear to be intelligent -- that is to say, did he appear to be a person who could have observed accurately what he was telling you about at the time of the occurrence, who could be likely to have remembered it accurately, and who is capable of repeating it to you accurately here during the course of his testimony? Another consideration for you to have in mind with regard to each witness is the question of whether the story that he has told is plausible. Does it ring true or are there inconsistencies in it? How does it fit with other evidence in the case which you believe and other facts which you find to have been proved? In short, does the testimony which was given by the particular witness whose credibility you are considering seem to you to be plausible? In this connection, you may also bear in mind that if you should find that any wit-

ness has been deliberately falsifying on any one material point in his testimony, you are privileged to take that fact into consideration in determining whether he has falsified on other points. Simply because you find that a witness has not repeated one fact accurately to you, it does not necessarily follow that he is wrong on every other point. A witness may be honestly mistaken on one element of his testimony and be entirely accurate and correct on other points. A witness may further be deliberately falsifying on one point and yet be entirely truthful on all other points. But if you find any witness has deliberately lied on one material fact, it is only natural that you should be suspicious of his testimony on all subjects, and under those circumstances you are entitled, if you wish to do so, to disbelieve his entire testimony. Whether you so disbelieve him or not, lies in your own sound judgment.

Now, I want to take a moment here also to say something about what, in the law, we call prior inconsistent statements. During the course of the trial, as you may recall, there was some testimony with

respect to Mr. Lunt and Mr. Ashcroft having given prior statements to the police before their testifying here on the witness stand. With regard to Mr. Lunt, there was an issue made with respect -- concerning his statement as to Mr. Orsini's description and whether or not there were rifles, as opposed to pistols, included at the time of Mr. Ashcroft's first visit to Mr. Cestaro's gas station. In Ashcroft's statement there was some claim of inconsistency with respect to the number of pistols that he had taken on his first visit, and then there was also a claim by the State concerning the statement that Mr. Cestaro signed at the State's Attorney's Office as to whether or not he knew that the guns were stolen.

Now, these three different statements were used in the course of this trial to prove what we call prior inconsistent statements. Now, a prior inconsistent statement is a statement that was made outside of the courtroom and it is allowed to be used in the trial not for the truth of what was said outside of the courtroom, but as a way of evaluating the truth of what is said on the witness stand. In

other words, it is just a yardstick to measure the testimony you hear on the witness stand against. And those statements, when they were referred to and came in to the evidence in this case, were limited strictly to the question of the truth of what was said on the witness stand. And they are to be used by you only in determining the truth of what was said on the witness stand and not the truth or veracity of what was said outside of the courtroom.

Now, another question you may well ask yourselves in passing on the credibility of any witness is if they or that witness has any bias or interest in the outcome of the case, and if so, whether he has permitted that bias or interest to color his testimony. Counsel made -- both counsel made reference to this type of thing during the trial and in the course of their final arguments. Defense counsel referred to the witness, Leonard Carpentiere's possible subsequent arrest or lack of the same. The State's Attorney made reference to Mr. Cestaro's relationship to Mr. Orsini, because he was married

to some cousin of Mr. Orsini's. Now, these matters were brought out to show possible bias or interest on the part of a particular witness. Now, it, of course, does not follow simply from the fact that a witness does have a bias or does have an interest in the outcome of the case, that his testimony is to be disbelieved. There are many people who, no matter what their interest in the outcome of the case might be, would not testify falsely. On the other hand, a jury should always bear in mind that if a witness has a decided bias or has an interest in the outcome of the case, that that bias or interest suggests somewhat of a temptation to shade his own testimony in accordance with his bias or to sway him to advance his own interests. It may even be that his bias or interest has so operated on his mind that he has come to believe what he wants to believe, and that, therefore, he may testify falsely without at the time consciously realizing that his testimony is false.

It is therefore obvious that if it should appear, as respects to any witness who it is claimed, in testifying, that he

has some bias or some interest in the outcome of the case, that fact is one that the jury should take into consideration in weighing his testimony.

Incidentally, I referred to Mr. Cestaro and Mr. Carpentiere -- it is possible there are other claims of bias, as I think about it, in the trial, and I don't mean to limit your consideration to only those two witnesses. You would apply this test to all the witnesses who testified, if you find it applicable.

Now, no fact, of course, is to be determined merely by the number of witnesses testifying for or against it. It is the quality -- not the quantity -- of the testimony which controls under our law.

In this particular case, there has been testimony from various police officers or members of the Federal Bureau of Investigation, who testified in their official capacity. Under our law, the testimony of a police officer or law enforcement officer is entitled to no special sanctity or credence merely because it comes from a police officer or law enforcement officer. A police officer who

takes the witness stand subjects his testimony to the same tests as any other witness, and you should not add or detract from his testimony merely because he is a police officer or a law enforcement officer. You should apply the same tests to his testimony as you would apply to that of any other witness.

Now, under our law, an accused person is under no obligation to become a witness in his own behalf, because, under our law, an accused person does not need to prove his innocence. It is for the State to prove him guilty. Therefore, you are not to consider the failure of the accused to testify as any suggestion of his guilt or to draw any inference against him because of his electing to exercise his Constitutional right not to testify.

Now, there is another point on credibility here that I wish to bring out. There was also testimony that a witness, Michael Lunt, had been guilty of burglary on January 13, 1975. Now, we have a statute in Connecticut which provides that, "No person shall be disqualified as a witness because of conviction of a crime, but

that such conviction may be shown to affect his credibility." The fact that a witness was convicted of a crime does not disqualify him as a witness, and it should not be considered in that light by you.

At common law, persons who had been convicted of infamous crimes were not qualified, as witnesses. As a matter of fact, at common law it really wasn't a problem because we hung them all for felonies and we did not have to worry about them coming back to testify.

But at common law, it was not much of a problem. So the Legislature passed statutes, and the statute which I have quoted in part to you has been construed by our courts to have as its purpose to make persons who have been convicted of infamous crimes competent witnesses.

It was not the intention of the Legislature to make such persons entitled to full credit, however. An infamous crime, broadly speaking, is one involving morale turpitude, the punishment for which may be imprisonment in the State Prison or the State Correctional Institution, as it now is called. The theory of the law is that certain crimes, and specifically crimes of

the type that I mentioned, burglary, involve traits of character that would affect a person's general credibility. Consequently, the fact of the conviction is merely one of the facts for you to take into consideration, along with any other material fact, in determining the credibility of the witness that is being attacked by the introduction of the record. So what I am saying to you is in evaluating the testimony of Mr. Lunt, you will apply all the other tests to his testimony with respect to his credibility, and you may, if you wish to do so, consider the fact that he had a prior felony conviction for burglary.

Now, as I am sure you will recall, we had testimony here also from Morris Ashcroft as to his participation in the various breaks and in the alleged conspiracy involving Mr. Orsini and in the sale of rifles to Mr. Orsini. Now, by his testimony, Mr. Ashcroft has, in effect, indicated himself to be both a co-conspirator of the conspiracy in the gas station, if you find there is such, and also is an accomplice in the sale of the rifles to Mr. Orsini. Now, it used to be, in a

criminal case, a jury could never use the testimony of an accomplice or a co-conspirator unless it was supported or corroborated by other testimony in the case. That, however, is not the rule in the State today. It no longer is absolutely necessary that the testimony of an accomplice or of a co-conspirator be corroborated before it is accepted as true by you, the jurors. However, in weighing the testimony of an accomplice or co-conspirator, it must be borne in mind that his is testimony of a self-convicted criminal, and everything else being equal, you would not believe the testimony of a man who has committed a crime involving moral turpitude as readily as you would that of a man of good character. And the amount of the moral turpitude involved in the participation of the witness in the crime should be weighed as another factor in your consideration.

For those reasons, the law now is that the jury must look with particular care at the testimony of an accomplice and scrutinize it very carefully before they accept it. Indeed, in most cases it would be unadvisable to rely on the testimony of

an accomplice, and if the jury does require corroboration, the amount of corroboration which it requires, rests entirely in your sound judgment as the jurors in the case.

Now, the first count in this case charges that at the town of Westbrook, Connecticut, on or about the 3rd day of January, 1975, the defendant, Chester Orsini, did commit the crime of larceny in the first degree in violation of Section 53a-122(a)(2) of the Penal Code.

That information has been supplemented by an answer to a motion for a bill of particulars, which I have been requested to send in with the information to the jury room. That, apparently, is perfectly agreeable, and the purpose for the request is that there is a discrepancy between the date on the first count in the information, which is January 3, 1975, and the date given in the bill of particulars, which amplifies the information, and the date given there is January 7, 1975.

Now, as far as the date of the crime is concerned, as to these two dates, -- the law does recognize that if the evidence proves the crime within that general area,

so that there is no element of surprise, so it is on the particular date that is given, it really doesn't matter whether it is the specific date that is given. So I would suggest to you that you not over-emphasize these two dates.

There was another thing that I think Mr. Zaccagnino was also talking about, and that was the date on the receipt. Now, that could be a different question -- that could be a question of credibility, and so forth, and the jury may take that into account. But what I am saying to you is to point to you how the question exists of a difference between the third and the seventh, or even the seventeenth, but you might consider the seventeenth with regard to other testimony in this case in deciding the issues, and so on.

As I just told you a moment ago, the first count charges that the defendant committed the crime of larceny in the first degree. Now, larceny means theft or stealing. However, our statute also provides that a person is guilty of larceny by receiving stolen property. If he receives, retains, or disposes of stolen property, knowing that it has probably been

stolen or believing that it has probably been stolen. Thus the State must prove that the guns recovered from Mr. Grosso's store from Stamford are the same guns sold by Mr. Ashcroft to Mr. Orsini, and these guns had been previously stolen by Mr. Ashcroft from the home of Joseph Burger of Westbrook. Unless you are satisfied beyond a reasonable doubt that the rifles out into evidence here are the same ones that were stolen from the Burger home, you couldn't find the defendant guilty. Now, evidence has been presented through testimony of Morris Ashcroft, David Evers, who was the fellow who worked on some of these rifles, Leonard Carpentiere, and Grace Strom, that these were in the Burger residence and that they had been stolen from his Westbrook home some time during late December or early January, 1975.

Now, I do not believe that you should have much difficulty with this point since, as I understand it, the question of the property being stolen is not seriously being contested by the defendant It is left to the State to prove, but they are not really raising an issue with regard to it, other than which particular break. Is

that a fair statement, Mr. Zaccagnino?

MR. ZACCAGNINO: Yes, Your Honor.

THE COURT: Alright. Now, I said to you that the statute refers to someone who receives, retains, or disposes of property. The State must also prove, in addition to the fact that the property was stolen, that the defendant received, retained, or disposed of the stolen property. Now, the connecting word "or" is used in that statute, so the evidence upon this element of the crime would be sufficient if it were proved that the defendant received or retained or disposed of the property. Now, as I understand it from our discussion, there is no claim here that the "retained" or "disposed" section of the statute are applicable. That this is a question of receipt of stolen goods. Not of disposing of them or retaining them. Is that a fair statement?

MR. ZACCAGNINO: That's correct.

MR. HURNEY: That's correct.

THE COURT: Let me just tell you, counsel have agreed to it rather than go through into that which is not applicable -- in other words, it is entirely possible to accumulate property legitimately and

then find out it is stolen. We are not concerned with that. That is, we are not concerned with retaining. Receiving means to acquire possession, control or title or to lend on the security of the property. Even though a person may have paid for the property, he is guilty of receiving if the other provisions of the statute are proven, and I will go into those in just a minute.

In addition to proving that the property was stolen and that the defendant received it, the State must also have proved that at the time of receiving the property, the defendant had the required guilty intention or state of mind. It must be proved that the defendant knew or believed that the property had probably been stolen, and he need not have knowledge or certainty that it was stolen property if he knew or believed that more probable than not it had been stolen, that would have been sufficient to constitute a violation of the law. It would not be enough for you to conclude that the defendant exercised poor judgment when he acquired the property or that he was careless and should have suspected that the property was stolen, under the circum-

stances. Negligence, no matter how great, is not enough to constitute the crime of receiving stolen property. There must have been an actual belief in the defendant's mind that the property was probably stolen. On the other hand, it need not be proven that he knew with absolute certainty that it was stolen property.

Now, on those points of knowledge, there is evidence in Mr. Ashcroft's testimony about the meeting in Meriden -- the giving of the receipt you may recall at that point. The discussion about Mr. Burger's health, and also statements made at the prior meetings at the Exxon gas station in Westbrook. What I am referring to here is that Mr. Ashcroft testified that each time that he met with Mr. Orsini, that he told him very specifically that the guns were stolen and where they were stolen from. Now what we are dealing with here, essentially, is the purchase of guns in Meriden. These would be the rifles alleged to have been stolen in the third break. And this is all we are concerned with, under this first count, at this moment.

Now, there is evidence, through Ashcroft, of direct knowledge. There is also a claim, I gather, by the State, of indirect knowledge, in the sense that he should have known. The defendant, in turn, has produced evidence here, through the testimony of Mr. Bassett and Mr. Cestaro and Mr. Syne, and I believe the witness today was Lawrence -- Mr. Lawrence -- about the fact that these guns were publicly displayed in his auto body shop garage business on Broad Street -- North Broad Street in Meriden.

Now, they are offering this evidence as a basis for you to infer that because the property was publicly displayed, there was no knowledge that the property was stolen.

Now, if you conclude that the defendant is guilty of larceny, you must go on to consider the value of the property involved, because the degree of the crime and the applicable penalty depends on the value of the property. The statute provides that value means the market value of the property or services at the time and place of the crime or, if such cannot be satisfactorily ascertained, the cost of

replacement of the property or services within a reasonable time after the crime. Market value, therefore, means price which the property would have sold for in ordinary transactions between willing buyers and sellers, at the time and place of the crime. It means the price which the thief would have had to pay for the property if he had bought it, rather than the price the owner would have had to pay to replace the goods.

Now, in this case, evidence has been presented that the items claimed to have been stolen from Mr. Burger and sold to Mr. Orsini were valued at exactly the sum of two thousand dollars, according to the tape which I have from the clerk, who added these figures up this morning. Now, I believe these figures to be accurate, and I presume you both checked these gentlemen?

MR. ZACCAGNINO: I don't have to.

THE COURT: Why don't you take a look at it and make sure that tape comes up with the right total.

MR. HURNEY: We have copies.

THE COURT: It is important, so I think you ought to check it. I will conti-

nue on a little bit about the value while you can check it.

The value which the property may have had to the owner is not important. Neither it is of any significance that the alleged thief did not realize the value of what was stolen or what he intended to steal, or if he intended to steal something of less value than the price which the property would sell for. Market value is controlling if it can be ascertained.

Now, with respect to this, I want to point out to you that both Mr. Ashcroft and Mr. Carpentiere testified that they took the rifles on the third trip. Now, for you to find the accused guilty in this situation, you would have to believe that these rifles that were sold to Mr. Orsini were the rifles that were taken on the third break at the Burger house. Further, you would have to ascertain the value, and I will explain to you in a moment the importance of that value.

In essence, as I said to you earlier, the degree of larceny is determined by the value of the property either stolen or received as stolen goods. In this case

the defendant is charged with larceny in the first degree, based on the claim that the value of the guns taken exceeded two thousand dollars.

Now, do you both agree that all of the exhibits entered, which we discussed, that would go into the jury room, total only two thousand dollars?

MR. ZACCAGNINO: Yes, Your Honor. So they don't exceed two thousand.

THE COURT: Mr. Hurney?

MR. HURNEY: Yes sir.

THE COURT: Now, that takes care of the problem, because for larceny in the first degree, the State must prove the value of the goods exceeds two thousand dollars. In other words, you have got to have at least two thousand dollars and one cent, and if you accept Mr. Wheat's appraisal as being accurate in every respect and credible, the most that this could total is two thousand dollars. So with respect to the charge of larceny in the first degree, I am now instructing you, as a matter of law, that you must return a verdict of not guilty on the first count charging larceny in the first

degree. However, the charge of larceny in the first degree encompasses amounts in a lesser degree. Therefore, you should go on to consider what the value of the property was, even though it was two thousand dollars or less. If you conclude that the value of the property is greater than five hundred dollars but did not exceed two thousand dollars, and if you find the defendant guilty in these respects, you would find him guilty of larceny in the second degree.

Now, I tell you this because the testimony also was, I believe, that in this sense there was eight hundred dollars paid. So really, the only credible evidence that you have to ascertain a value on this first count, which is the sale in Meriden, allegedly, on the rifles after the third break -- they are the only two figures you have to consider here -- that is, Mr. Wheat's testimony of two thousand dollars, or the figure of eight hundred dollars, which was allegedly paid by Mr. Orsini to Mr. Ashcroft. If you accept either of those figures, then you have larceny in the second degree. But if

you don't accept either of those figures -- and you have a right to choose who to believe or disbelieve -- and if you disbelieve both of these witnesses as to the value, then you go on to another statute that we have, assuming all the other factors of receiving stolen property are proven -- if you conclude that the value of the property was either unproved -- let me put it this way -- if you conclude it was unproved -- if you don't accept either of the figures, your verdict will be that the defendant is guilty of larceny in the fourth degree.

Now, the reason for that is the law says that if a value is not proved, it will be presumed to be under $50.

So what your choice is here, on the first count, is first, whether the defendant was guilty of larceny in the second degree. And then you jump down, if you don't accept the figure of either $2000 or $800, because the charge of larceny in the second degree is bracketed between $500 and $2,000 -- if you don't believe him guilty of that, then you go down to fourth degree larceny, assuming, now, that all the other elements of the

crime are proven, as I have indicated to you. Obviously, if you find that the other elements of the crime, in terms of receiving, and so on -- the knowledge that the property was stolen, and so forth -- have not been met, then you return a verdict of not guilty and don't go on to consider the other factors at all.

What I am talking about here is with respect to this, value only comes into play if you find all the other things existed. If you find that a sale had occurred, that the property was stolen, that Mr. Orsini knew or should have known it was stolen -- then you have the question of the gradation of the crime. If you find no crime was committed and no question of gradation -- as I say, you just return a verdict of not guilty.

Now, as I indicated to you earlier, the defendant is also charged in the sixth court, with the crime of conspiracy. Now, let me read that whole thing to you. It says, "And the State's -- the said State's Attorney further accuses the said Chester Orsini, at the town of Westbrook, Connecticut, on or about the twelfth day of December, 1974, of committing the crime of

conspiracy, and charges that the said Chester Orsini did combine, conspire, confederate and agree with Morris Ashcroft and Thomas Cestaro to commit the crime of conspiracy to commit larceny in the second degree, and in furtherance of said conspiracy, the aforesaid property, to wit: Antique guns, in violation of Section 53a-48(a) and 53a-123(a)(2) of the Penal Code."

Now, in this sixth count of the information, as I indicated, the accused is, in effect, charged with having committed the crime of conspiracy to commit a larceny in the second degree. It is charged that the accused did, with intent that conduct constituting a larceny in the second degree be performed, agree with Morris Ashcroft and Thomas Cestaro to engage in or cause the performance of a larceny in the second degree, and specifically, in this situation, it would be a larceny by receiving stolen goods. That is to say, the conspiracy would be for the sale of stolen goods worth more than $500, on December 12, 1974, in the town of Westbrook.

Now, you may remember again, on the second degree larceny, I told you before that breaks down into a category of more than $500 and $2,000. A ceiling of $2000, so to speak. And this is the type of larceny that it is claimed that the defendants conspired to commit.

Now, this charge, in effect, involves the two meetings between the parties at Cestaro's Exxon Station only. Now, there were two meetings, in the testimony, if you believe it. The first was between Mr. Ashcroft and Cestaro. Mr. Ashcroft testified that he came in with the guns, and specifically, the pistols, at that time, in the blue duffel bag, and said he wanted to sell and dispose of them and Mr. Cestaro indicated that he didn't want to buy them but he knew somebody that might, and they went into the bay there and talked business with Cestaro. Now this is Mr. Ashcroft's testimony -- Mr. Cestaro refutes some of that. But, in essence, what I am talking about is at this meeting between Ashcroft and Cestaro, and the second one is the one that allegedly occurred between Ashcroft, Cestaro, and the defendant,

Orsini, where he came to the station and discussed this and where he went off later on, according to one of the witnesses, in his car with Ashcroft.

Now, Section 53a-48(a) of our statutes reads as follows: "A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy."

So, under this statute, to constitute the crime of conspiracy, there must be a corrupt agreement between two or more individuals. Now, we have a rather unusual situation in this case, and I want to tell you now that for you to find conspiracy, there must be an agreement between three or more individuals. And -- in effect, you must find an agreement between Mr. Cestaro, Mr. Ashcroft, and Mr. Orsini, and the reason for that is simply this, that there are certain crimes, and the one I always offer as the illustration is the crime of adultery could only be committed -- and you can't even commit that very well anymore under our Penal Code -- I

don't knw what you call some of it now -- but the crime of adultery obviously, by it's very definition, requires two people to commit the crime. So the law, in effect, was that you could not have a conspiracy to commit any adultery because just the very fact of committing the adultery constituted -- it required two people, and the conspiracy or the agreement to commit the adultery was merged in the adultery itself, and it was one crime. This is also true of the crime of receiving stolen property. If it only involves the seller of the stolen property, if you will, and the receiver of the stolen property. In that situation, the conspiracy would merge into the crime of larceny, itself, at the time of sale. But now, what we have here is the entrance of an intermediary, if you accept the State's version of the case. And as soon as you have that situation, then it is possible for all three parties to be guilty of conspiracy. But it must be three parties. You must have an additional person over and beyond the ones necessary to commit the crime. Now as we saw the other day, in researching this, the case of adultery being used as an illustration, this is

sometimes known as the legitimate exception to the merger of the crime -- I do want to point out to you that the situation, in respect to the conspiracies, because of this crime being larceny, then we have got to have larceny in the -- excuse me -- you have got to find conspiracy between the three individuals.

I knew it was that bad -- I knew it was bad, but I didn't know it was that bad.

Now, you must also find, one, that there was a corrupt agreement between three or more individuals, but you, secondly, must find that it was entered into with a criminal intent to do an unlawful act, either as a means to accomplish something or as an end, in and of itself. Following -- there is a third fact that -- there must be an overt act to complete the subject of the agreement. In other words, you not only have the agreement -- you must have an overt act to carry the agreement out. So the full element of the crime of conspiracy is the corrupt agreement, and in this situation it must be between three or more individuals. This requires involvement of three or more per-

sons because, as I told you, there cannot be a conspiracy only between the seller and the buyer of stolen goods. Therefore, the first thing you must decide is, did the accused form an agreement with both Morris Ashcroft and Thomas Cestaro to buy the guns which Morris Ashcroft had stolen in the first burglary of the Burger home when they all knew or should have known that the guns had been stolen by Ashcroft?

Now, let me enlarge a little bit on this matter of the agreement. For three or more persons to be guilty of crime of conspiracy, it is not necessary that there should be a formal agreement among them. It need not be in writing. It need not be in any expressed form. It is not necessary for the State to prove that there was a formal or expressed agreement among them. It is sufficient if there is a meeting of the minds -- that is, if the parties understand each other, whether they express themselves in so many words or not.

Now, stated somewhat differently, it is ample if the parties reach an understanding that they should work together

with a single design for the attainment of a common purpose. One does not become a member of a conspiracy simply because he knows that a combination for unlawful purposes has been formed by a group of persons and does nothing about it, that is, unless the law imposes a duty on him to do something about it, and he deliberately refrains, in order to aid the conspiracy, from doing that which the law requires of him.

Only such person, who is a party to the agreement, or who knowingly does an act in furtherance of the common design, is liable as a conspirator. Before you bring in a verdict of guilty against this defendant on this charge in the sixth count, you must be satisfied beyond a reasonable doubt, in the first place, that he knowingly participated in the unlawful agreement, and this is the unlawful agreement charged in that sixth count of the information.

The mere knowledge, acquiescence or approval of an unlawful act, without cooperation or agreement to cooperate, is not sufficient to constitute one a party to a conspiracy to commit the act. It

requires more than proof of mere passive cognizance of a crime on the part of an accused to sustain a charge of conspiracy to commit it.

A partner is not responsible for the criminal act of his co-partners, done without his knowledge and consent, for there can be no partnership in crime. A person is not liable for the act of another merely because he is present when it is committed.

Now, this just makes common sense, because you know what you are saying here is the fact you happen to be there when there is an agreement to commit a crime or crimes does not mean you are participating in the crime. But just to illustrate, if you were a customer in the bank when the bank was held up, the fact you happened to be there wouldn't make you a party to any agreement to rob the bank by your presence. However, to become a conspirator does not require one to have direct communication with all other conspirators. It is not necessary that each conspirator be acquainted with all the others or even know their names. It is ample if he has come to an understanding with at least one of

the others and has come to an understanding with that one to further an unlawful purpose or to perform an unlawful act.

Now, to stretch your credibility a little bit, I want to go back again to what it would mean if you were the customer in the bank and people came in to rob the bank, and you pulled a gun and said, "I'm with you," you are part of the conspiracy at that point, even though it was all worked out. And as soon as you make the move -- the move of pulling the gun, that is the overt act, you are in trouble, even though you might not have known who the other people were, and you might not have participated in the original plan, and begin to carry it out. In other words, it is not essential that the conspirator know what the complete planned conspiracy is in all its detail. It is enough if he knows a conspiracy exists or that he is creating one, and that he is joining with at least one other person in an agreement to commit a crime.

Therefore, in order to sustain a conviction of this accused on the charge containing this information, the first

element which the State must prove, beyond a reasonable doubt is this. It must prove that this accused entered into an agreement with at least the other two persons named in the information, that is, Mr. Cestaro and Mr. Ashcroft -- to buy stolen property.

Now, to turn to the second element of this crime of conspiracy, which the State must prove beyond a reasonable doubt before the accused may be found guilty of this charge, the State must prove that the accused entered into an agreement to commit a crime with the intent that acts necessary to further the commission of that crime be performed. In other words, the State must prove this accused was actuated by criminal intent. The accused may not be found guilty of this charge unless you find that the State has proven, beyond a reasonable doubt, that the accused had a specific intent to violate a law when he entered into the agreement to which I have referred.

In other words, you really have to mean it, in this charge, to commit a crime. The old joke, about, "Someday I am going to rob a bank," but you don't mean it, is

still a joke. The day you get together on this and take a step in that direction, then you have a violation of the law.

Now, what a person's purpose or intention has been is necessarily very largely a matter of inference. A person may take the stand and testify directly as to what his or her purpose or intention was, and that testimony you can believe or not, according to whether or not it warrants belief, depending upon the testimony. But no witness can be expected to come here and testify that he looked into another person's mind and saw therein a certain purpose or intention. The only way in which a jury can determine what a person's purpose or intention was, at any given time, aside from that person's own testimony, is by determining what that person's conduct was and what the circumstances were surrounding that conduct, and from those infer what his purpose or intention was.

To draw such an inference is not only the privilege but also the duty of a jury, provided, of course, the inference drawn is a reasonable one. Now, you will recall

what I said about circumstantial evidence at the beginning of this charge. In this case, therefore, it will be part of your duty to draw all reasonable inferences from the conduct of the accused, in light of the surrounding circumstances, as to what the purpose or intention was in the accused's mind at the time he entered into that agreement, if he did.

Here, again, you have contradictory evidence. You have contradictory evidence by two of the alleged co-conspirators -- Mr. Cestaro and Mr. Ashcroft. Mr. Ashcroft testified that he entered into this agreement. He used Cestaro as intermediary for selling stolen goods to Orsini, and he told Orsini that the guns were stolen, and he told Cestaro that the guns were stolen. Now, on the other hand, the other alleged co-conspirator Mr. Cestaro, has taken the witness stand and says, "Not so. I did not know that the guns were stolen." So you have to decide which of them you will believe in this situation. Now, they had taken the stand directly to testify as to what their own intention was. I do want to point out to you that, as I mentioned earlier, you can-

not draw any inference from the fact that Mr. Orsini has elected not to testify. You may not consider that as a basis for an inference, in other words, on the situation. What I am talking about here now, is, however, you can consider his other acts at that meeting at the Exxon Station in Westbrook in determining what his intention was, and in entering into any agreement here. So that the inference as to his conduct is permissible. The inference from his failure to testify is not.

Concerning criminal intent, there is a general principle of law which applies in nearly every criminal case, and certainly applies in this case, that in order to be guilty of a crime, an accused must have a criminal intent or guilty knowledge. This means before an accused should be found guilty of a crime, it must appear and be found, beyond a reasonable doubt, that in doing the acts complained of, the accused had a guilty mind, or, as it is sometimes stated, an intention to do evil. If, in doing the acts complained of, that accused has not that intent, he is not guilty of the crime.

For instance, if an accused is honestly mistaken as to the existence of certain facts; if, without gross negligence on his part, he honestly believes that certain facts existed, and, if, in the light of those facts which he believes to exist, the act charged against him would appear to be entirely moral, then the act with which he is charged is not a crime, even though it would be immoral in the light of the true facts. There, you see, the act charged is not a crime because the accused committing the act has no evil intent.

In other words, what it amounts to is that you can innocently agree to buy what is stolen merchandise -- receive stolen merchandise if you don't know that you are committing an illegal act. That is -- you have to have the evil intent to be guilty under this situation.

In the same way, if the accused has done the act charged accidentally, without gross negligence, the act is not a crime because it was not done with evil intent. For instance, if, in this case, you should find that this accused did some act which

really assisted some other in accomplishing an unlawful act, but in doing it, because of his ignorance of the existence of some material fact, he did not realize that the doing of the act was in aid of any crime, then the doing of that act would not make him guilty of the charge because it was done without any evil intent.

Evil intent here is a little different than evil intent I was talking about earlier, although essentially it is the same. This deals with commission of an overt act , and even there it says the overt act must be committed with evil intent.

What I have said about matters of fact or mistakes of fact excusing a person from crime because it removes from the crime the element of guilty intent does not apply to mistakes of law. As you probably have heard many times, ignorance of the law excuses no one. If a person does an act which, in the light of the facts as he knows them to exist, is evil or immoral, and is recognized by him to be such, it makes no difference that he is ignorant of the fact that the act is expressly prohibited by law or is unlawful.

The reason for this rule is obvious. In most cases it would be impossible to prove that an accused did or did not know that the law expressly forbade the act with which he is charged with -- or which he is charged with committing. Public policy, therefore, demands that we proceed on the presumption that everyone knows the law; and, therefore, the law is that no one may escape punishment for crime simply by saying that he was ignorant of the fact that the law forbade the doing of the act. The evil purpose, that is, criminal intent, essential to make it a crime need not be an intention to break the law. It is sufficient if it is simply an intention to do the thing which the law, in reality, does forbid.

Now, essentially, what this boils down to, is the question of credibility -- whom you believe, and whether or not Mr. Orsini knew that the guns were stolen because Ashcroft told him, or whether he, in effect, bought them thinking, if you find he had, that he was getting them from somebody who had gotten them from his grandfather's estate.

Now, there is a third element in the

crime of conspiracy, and this third element requires that the State must prove that one of the co-conspirators did an overt act within this State in furtherance of the conspiracy. Let me put it this way. In order to sustain a conviction of this accused on this charge contained in the information, the State must prove that at least one of the co-conspirators -- and it makes no difference whether all of the conspirators were charged or not, did an overt act within this State to further the purpose of the conspiracy.

An overt act is an open act done in pursuance of and a manifestation of a design or intent, and the act must be something that goes further than merely to make preparations in a general way. It must be an act directly tending to carry out the actor's unlawful intent.

You will note that this third element does not require an overt act by each conspirator. The third element is established if the State proves that any of the conspirators performed such overt act, but the act must be something outside of the act of agreeing. It must be something done by at least one co-conspirator after

the agreement has been formed, and it must be an act done to further the purpose or purposes of an illegal agreement.

If the act furthers the conspiracy and helps carry it out, it makes no difference that it is not, in and of itself, criminal. But even if it is criminal, and intended to be criminal by the overt actor, it cannot be held against the other co-conspirators if it was not intended to further their general purpose, but was secretly intended to further only the actor's own personal purposes.

In essence here -- let me just say if you find there was an agreement between these three people, then it doesn't matter whether the agreement started out with an agreement between Mr. Ashcroft and Mr. Cestaro, and then Mr. Orsini came into it later. If any one of the three of them did anything to carry out that conspiracy, in other words, the State's Attorney referred to Mr. Cestaro's telephone call to Mr. Orsini -- then there is even testimony -- I think it was by either Mr. Lunt or Mr. Hazuka -- at the moment I don't recall which -- about Ashcroft meeting in

the car with Mr. Orsini to drive away to get the guns. If they left to get those guns, and that was the purpose of leaving, that is a sufficient overt act, in and of itself, right there. If this is what they went for, even though they may never have gotten them or never successfully completed the transfer. But what it says here is that you must do something to carry out the plan which you intended into originally. That some affirmative action must be taken.

It is, of course, very rarely that the State is able to prove that persons charged with conspiracy entered into an expressed agreement that they would unite to accomplish an unlawful purpose. The proof of an unlawful conspiracy is not often made by direct, open, and positive evidence of an agreement. More generally, and more naturally, proof of the agreement is made by showing a repetition of acts of a character conducive to show a mutual purpose.

In a conspiracy, it is seldom true that any one act, taken by itslef, can be detected as tending to proof an unlawful

agreement. But, when it is seen in connection with other acts, its true nature may be discovered, and as this species of proof is multiplied, a strong case of unlawful agreement may be established.

To put it another way, the unlawful agreement may be proved by circumstantial evidence, that is, by proof of the separate acts of the members of the conspiracy, and of the circumstances, from which the existence of the illegal agreement may be inferred.

Before you should bring in a verdict of guilty against this accused on the sixth count on the information, you must be satisfied, beyond a reasonable doubt, that he participated in the unlawful agreement charged. If you find that the various acts of the parties were committed in such a manner and under such circumstances that you conclude there from, beyond a reasonable doubt, that those acts were done as a result of a previous agreement or understanding among the three, and were done in concert, then you have found an unlawful agreement existed among the parties who participated in those acts.

As I indicated earlier, it is not necessary that the crime which was the objective of the conspiracy was carried out successfully. Since conspiracy, in and of itself is a crime, if any overt act is done to carry out the conspiracy, separate from the crime which is the objective of the conspiracy. To use it again, in the terms of the bank I just talked about, an agreement to rob a bank and doing an act to carry that agreement out is a crime, even though separate and distinct from the actual robbing of the bank. It can be a crime without the bank ever having been robbed, because the agreement, itself, is illegal, and that constitutes a separate and distinct crime. So, you see, we are not concerned about whether or not a substantive crime did occur or go on to talk about the substantive crime which was the subject of the conspiracy, at this point in the charge. However, in this case we have something a little different. In this case, in the sixth count, Mr. Orsini is charged with larceny -- conspiracy to commit larceny in the second degree. Lar-

ceny in the second degree, as I have already indicated to you, involves receiving stolen property of a value in excess of $500. At the time of this agreement, if you found that such agreement existed, it becomes important to find the value of the property that was involved, because, as I have indicated to you earlier, it determines the grade of the larceny that is involved.

Now, there is no evidence as to which pistols were transferred at the time to Mr. Orsini, if any. The only evidence concerning value in this connection was Mr. Ashcroft's testimony that he got $300. I think we are all agreed on that. So I am telling you, again, that you cannot return a verdict of larceny in the second degree, because the only evidence of value is under the legal limit of $500. So you would have to return a verdict, if you find you should return a verdict on this, of larceny in the third degree, which is the limit between $50 and $500.

Now, it is possible that you could find an agreement, that is to say a conspiracy -- an illegal agreement to receive stolen goods. It is possible you might not

believe Mr. Ashcroft as to the $300. If that happens -- if you find a conspiracy and the subject of the conspiracy to be -- to receive stolen goods, but you don't believe Ashcroft as to the $300, then you have to come in with a verdict of larceny in the fourth degree, which is the law I told you about earlier, where no value is proven. I hope that makes sense to you. But if you think of it in terms of it has got to be over $2,000, but under $2,000 is larceny in the first degree -- or second degree. $2,000 is the breaking point. Now, it says in express of, so it was not proven on first degree because it was $2,000 or less. That became larceny in the second degree. Then the next breaking point is $500. And after $500 or less -- where it is $50 to $500, you get into larceny in the third degree. If it is $50 or the amount is not proven, then it is larceny in the fourth degree. So the choice you can come up with here is either a conspiracy to commit larceny in the third degree or the fourth degree.

Now, in other words, what I am saying, if you find that all three of the alleged co-conspirators have been proven to have

participated in a conspiracy to commit larceny in the third degree, you will find the defendant guilty of the conspiracy to commit larceny in the third degree. If you find the conspiracy occurred, but you don't accept the testimony as to value, you will find him guilty of a conspiracy to commit larceny in the fourth degree. As I said, if you do not find any conspiracy, you don't go through all these mental gymnastics, because if there is no conspircy, it makes no difference what the degree of larceny, because you return the verdict of not guilty.

Now, that sort of pretty much sums up the specific crimes, and in a moment I will be through. In other words, you will have to decide, on the basis of all the evidence presented before you, whether the State has proved, beyond a reasonable doubt, all of the elements of the crimes with which the accused is charged, as I have explained those elements to you. You will have to decide whether you believe the State's witnesses as to the commission of these crimes, and the participation of the accused, or whether you believe the testimony of the defendant's witnesses as

to the defendant's innocence. In essence, it is as simple as that. If you find that the accused committed any one of the crimes I have instructed you on, then your verdict will be guilty as to such crime. If you find he did not commit such crime, you will of course find him not guilty of such crime. As I told you before, I am directing the verdict on the highest degree in the -- both of those counts, and you have to then consider the lesser degree, and what I am saying applies to this lesser degree.

Your verdict, I am sure you know, must be a unanimous one, which you will report orally through your foreman or forelady, as the case may be, when told to do so by the Court.

Let me just go into this a moment. What you will have to do is render an oral verdict by my direction of not guilty of larceny in the first degree on the first count. You will then consider whether or not you consider larceny in the second degree or larceny in the fourth degree or whatever. And the same is true of conspiracy to commit larceny in the second degree, in the sixth count. You will return

a verdict of not guilty of conspiracy to commit larceny in the second degree. You then go on to consider whether or not the other degrees which I indicated, are met, and if you do return a verdict in each instance of guilty, you go on to say guilty of whatever lesser degree that you find. Obviously if you return a verdict of not guilty this is what you say and you don't have to say any more.

I am sure that you must know that the verdict must be a unanimous one which you will report orally. You, of course, are sworn to decide this case strictly on the evidence, without any prejudice or without any sympathy and without any fear, and without giving any consideration to any penalty which may or may not be imposed by the Court in the event of a conviction. The penalty is a question of law for the judge, if there is to be one, and is of no concern to you, as jurors.

When you retire to the jury room, you should first elect a foreman, and then proceed with your deliberations in accordance with the instructions I have given. When you are ready to present the verdict, there is a switch which you put on and it

puts the light on and the sheriff will know you have reached a verdict and will notify us.

You will have the information and the exhibits in the jury room with you, together with the bill of particulars I referred to before. You may use them in any way which may assist you in your deliberations. Now, there is one other thing that I have to do at this time. Mr. Rearick, I believe you are very fortunate. Under our old procedure, the alternate did not even sit with the jury -- was a separate kind of thing, but we have moved up at least so that you can sit in the jury box with the jurors, but unfortunately, the law has never changed as to allow you to participate in the jury's deliberations. So at this point I am going to excuse you from further service in this case and thank you for your participation in the case. I wish I could allow you to go in and deliberate with your fellow jurors, but unfortunately the law does not permit that. So I will now ask the six of you to retire, and in a minute the sheriff will bring in the

exhibits, and so forth, to you and you may proceed with your deliberations, and Mr. Rearick has to be excused from further duty in this case. You may be excused. (Tr. pp. 574-629)

Defense counsel noted only one exception to the charge:

MR. ZACCAGNINO: Yes, Your Honor. Just one thing I want to ask Your Honor, you could think about, Your Honor charged, in the last statement you made just before you started to tell them about the deliberations, were in this context, "If you believe the State's witnesses, you" -- something about "guilty" -- you went on to say, "Or you can believe the defendant's witnesses that tended to prove his innocence." That might give the opinion that we have to prove that. And we don't have to prove anything, if they haven't made out a prima facie case.

THE COURT: I think, considering the whole charge, in that context, that was clear in the beginning.

MR. ZACCAGNINO: I thought I would bring that out.

THE COURT: The problem was balancing of the testimony.

MR. HURNEY: Just an exception to Your Honor's failure to charge on my request to charge.

THE COURT: I didn't -- I am sorry to put you to sleep. I don't know if I disturbed you, but your snoring disturbed me.

MR. HURNEY: I am sorry.

THE COURT: Don't let it happen again. If you need a break tell me so. Don't do that again, ever.

(Tr. pp. 629-630)

92-110

In the

Supreme Court Of The United States

FILED
AUG 10 1992
OFFICE OF THE CLERK

No. _____

OCTOBER TERM, 1992

CHESTER GREEN
Petitioner

v.

STATE OF CONNECTICUT
Respondent

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

AUSTIN J. McGUIGAN
Chief State's Attorney
Post Office Box 5000
Wallingford, CT 06492
(203) 265-2678
Counsel of Record for Respondent

With Whom On The Brief

CARL SCHUMAN
Assistant State's Attorney
Office of the Chief State's Attorney

QUESTIONS PRESENTED

1. Was the petitioner denied due process of law at his state criminal law when in the course of its charge the trial court instructed the jury to choose between the comparative credibility of prosecution witnesses and defense witnesses?

2. Did the Connecticut Supreme Court err in upholding the validity of the petitioner's persistent felony offender conviction by finding that the underlying offense of aiding in the commission of an abortion did not involve a physician and thus that the offense was constitutional?

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RULE INVOLVED

Rule 17.1
Revised Rules of the Supreme Court
of the United States

Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

STATEMENT OF THE CASE

As its statement of the case, the respondent adopts, with only the minor modification made at the end, the following excerpt from the opinion of the Connecticut Supreme Court (Petition at 5a-7a):

> In late December one Morris Ashcroft and two companions broke into a home in Westbrook and removed several antique guns from a chest in the basement. Through an intermediary, Ashcroft met the defendant at a gas station in Westbrook and sold him the guns for $300, informing him that they were stolen and narrating the circumstances of the burglary.
>
> Several days after Ashcroft re-entered the same house in Westbrook and took some more guns. He telephoned the defendant and arranged to meet him at a store in Westbrook, telling him he had stolen some other guns from the same place. When they met, the defendant purchased these guns for $500.
>
> A week or two later Ashcroft, this time with one companion, stole some rifles[2] as well as other items from the Westbrook residence. The defendant met Ashcroft at a restaurant in Meriden as a result of a telephone conversation and he bought the rifles for $800. At this meeting Ashcroft signed a receipt indicating a price of $2500 for the rifles. There was testimony that all of

[2] The guns previously stolen were presumably pistols.

> the stolen guns, which were admitted in evidence at the trial, had a value of $13,295.

On the basis of this evidence the jury found the petitioner guilty of one count of larceny in the second degree and one count of conspiracy to commit larceny in the second degree. The court then found the petitioner guilty of being a persistent felony offender. The defendant appealed to the Connecticut Supreme Court, which unanimously affirmed his conviction.

REASONS FOR THE DENIAL OF THE WRIT

I. THE DECISION OF THE CONNECTICUT SUPREME COURT REGARDING THE COMPARATIVE CREDIBILITY INSTRUCTION USED IN THIS CASE IS IN COMPLETE ACCORD WITH THE DECISIONS OF THE FEDERAL CIRCUIT COURTS AND OF THIS COURT.

The petitioner initially claims that he was denied due process of law when the trial court instructed the jury to choose between the comparative credibility of the prosecution and defense witnesses. Although the petitioner does not cite to any specific provision of the Considerations Governing Review on Certiorari, see Rule 17.1, Revised Rules of the Supreme Court of the United States, apparently the petitioner seeks a writ of certiorari on the theory that the Connecticut Supreme Court, in upholding the trial court's charge, has decided the comparative credibility question in a way in conflict with the decisions of several federal courts of appeal. See Rule 17.1(b).

In only one of the federal cases cited, United States v. Oquendo, 490 F.2d 161 (5th

Cir. 1974), did the circuit court reverse the defendant's conviction. There the district court had "repeatedly cast[] the jury's determination of whether to convict or acquit in terms of a mere credibility choice . . . ." Id. at 165. In the other cases the courts condemned the specific language under attack but after reviewing the entire charge found no reason to upset the conviction. Thus in United States v. Guest, 514 F.2d 777 (1st Cir. 1975), the court distinguished prior cases, including Oquendo, in which there had been "a more constant harping on the theme of comparative credibility . . . ." Id. at 779. In United States v. Brown, 582 F.2d 197, 201-02 (2d Cir.), cert. denied, 439 U.S. 915 (1978), the Second Circuit emphasized "the repeated references by the trial judge to the burden of proof resting on the prosecution." Id. at 201. Accord United States v. Pino, 609 F.2d 106, 108-09 (3d Cir. 1979).

Far from conflicting with the decisions of the federal courts, the holding of the Connecticut Supreme Court accords fully with them. Petition at 20a-23a. The instruction to compare the credibility of defense and prosecution witnesses occurred only once, Petition at 57e-58e, and occupies only four sentences in a charge that consumes some sixty-two pages of the Petitioner's Appendix. See United States v. Guest, supra; cf. United States v. Oquendo, supra. The trial court reminded the jury of the prosecution's burden of proof beyond a reasonable doubt on some nine occasions, Petition at 5e-10e, 23e, 40e, 43e (three times), 46e, 53e, 57e; see United States v. Brown, supra; United States v. Pine, supra, including once at length, Petition at 5e-10e, and once immediately prior to the language singled out by the petitioner. Petition at 57e. As for the petitioner's additional contention that the comparative credibility charge emphasized his

failure to testify in his own behalf, Petition at 9, it should suffice to say that the authority he cites is totally inapposite[1] and that, in any event, the trial court twice in explicit terms admonished the jury not to draw any adverse inference from the defendant's decision to remain silent. Petition at 17e, 46e.

A decision that in the context of the entire charge a comparative credibility instruction does not work fundamental injustice harmonizes not only with the rulings of the federal circuit courts, but also with the approach consistently taken by this Court. Just last term in United States v. Frady, 102 S. Ct. 1584 (1982), this Court reaffirmed that:

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[1] United States v. Alfonso-Perez, 535 F.2d 1362, 1366-67 (2d Cir. 1976), dealt with a claimed reference by a prosecutor in his summation to the defendant's failure to testify, and not with a comparative credibility instruction.

> "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Cupp v. Naughten, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973)(citations omitted). Moreover, "a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction."

Id. at 1595. Because the challenged holding of the Connecticut Supreme Court conforms completely with these principles, it does not warrant further review by this Court.

II. THE QUESTION OF WHETHER THE PETITIONER'S PERSISTENT FELONY CONVICTION RESTED ON AN UNCONSTITUTIONAL PREDICATE FELONY IS INAPPROPRIATE FOR REVIEW AS IT TURNS SOLELY ON A FACTUAL ISSUE, THERE IS AN INSUFFICIENT RECORD, AND INDEPENDENT AND ADEQUATE STATE GROUNDS SUPPORT THE DECISION BELOW.

Petitioner also seeks review of the Connecticut Supreme Court's decision upholding the constitutionality of his prior conviction for aiding and abetting the commission of an

abortion, an offense which formed the basis for the trial court's finding that the petitioner was a persistent felony offender. The petitioner reasons that since Roe v. Wade, 410 U.S. 113 (1973), struck down a statute similar to the Connecticut abortion law, he was convicted of a charge which was either invalid on its face or unconstitutional in its application. Petition at 13.

The state fully acknowledges that a habitual offender conviction cannot rest on an unconstitutional predicate offense. Baldasar v. Illinois, 446 U.S. 222 (1980). Thus the only question in this case is whether that principle applies. In Connecticut v. Menillo, 423 U.S. 9 (1975), this Court declared that "Connecticut's statute remains fully effective against performance of abortions by

nonphysicians." Id. at 11.[2] Given this holding, it is apparent that the constitutionality of the defendant's persistent felony offender conviction turns solely on whether the person who actually performed the abortion in question was a physician.

The obvious reason why this Court should not address this question is that it is wholly

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[2] Such a holding, of course, merely exemplifies the general rule that a statute may operate in a manner consistent with constitutional requirements in one set of circumstances although as to another it may produce an unconstitutional result. Boddie v. Connecticut, 401 U.S. 371, 379 (1979). In light of these principles, there is no merit to the defendant's contention that the abortion statute was unconstitutional on its face.

factual in nature.[3] This Court has stated that "matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open for reconsideration [here]." Wolfe v. North Carolina, 364 U.S. 177, 196 (1960). The resolution, moreover, of a purely factual issue such as whether a particular abortion

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[3] Only cursorily does the petitioner raise the legal question of whether the Connecticut Supreme Court employed permissible methods in declining to find that the abortionist was physician. Without citing to any authority, the petitioner, in his concluding two sentences, challenges the "presumption" allegedly used by the Connecticut Supreme Court in deciding "that the facially invalid statute was applied in a lawful manner." Petition at 14. Whether the court utilized such a presumption is not altogether clear. To a large extent, the court based its decision on the fact that in the trial court the petitioner failed to attack the constitutionality of his prior conviction. Petition at 26a-27a. There is, in any event, authority to the effect that, except when a claimed denial of the right to counsel is raised, the silence of a trial court record with respect to the regularity of its procedure gives rise to the presumption that the court complied with all jurisdictional and procedural requirements for the entry of a valid judgment. Crawford v. Coiner, 152 W. Va. 411, 163 S.E.2d 793, 797-98 (1968).

was performed by a licensed physician could have absolutely no precedential value for the legal system as a whole.

Even if this Court were otherwise inclined to address the factual issue here, there is no record to facilitate such review. The petitioner admits that in the Connecticut Supreme Court opinion upholding his original aiding and abetting conviction "there is no indication one way or the other respecting the physician status of the individual Orsini had assisted although there are some indications that the individual was considered to be a physician." Petition at 13. An examination of the record and briefs of that appeal is similiarly unilluminating. While the actual resolution of the factual question under consideration may well lurk invisibly behind the record, it is self-evident that this Court, as a Court of last resort, cannot conduct the evidentiary hearing necessary to resolve the dispute.

Related to and no doubt responsible for the lack of a complete factual record for evaluating this claim is the fact that the defendant never raised the claim in the trial court. See Webb v. Webb, 101 S. Ct. 1889, 1893 (1981)(requirement that federal issue be presented first in state court affords parties opportunity to develop record necessary for adjudicating the issue); Petition at 23a. It is familiar rule that the failure to present a federal question in conformance with state procedures constitutes an independent and adequate ground of decision barring review in this Court so long as the state has a legitimate interest in enforcing those procedures. Michigan v. Tyler, 436 U.S. 499, 512 n.7 (1978). Connecticut has such

contemporaneous objection rules[4] and unquestionably legitimate purposes have been advanced in their support.[5]

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[4] "Only in most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court." State v. Evans, 165 Conn. 61, 69, 327 A.2d 576 (1973).

[5] In the words of the Connecticut Supreme Court, the consideration of alleged errors raised for the first time on appeal would mean that:

> (1) claims of error would be predicated on matters never called to the attention of the trial court and upon which it necessarily could have made no ruling in the true sense of the word; and (2) the appellee, [in a criminal case] the state, would be lured into a course of conduct at the trial which it might have altered if it had any inkling that the accused would, in the event of a conviction, claim that such a course of conduct involved rulings which were erroneous and prejudicial to him.

State v. Kurvin, 186 Conn. 555, 564, 442 A.2d 1327 (1982).

It might be said that in this case the Connecticut Supreme Court chose not to exercise its own contemporaneous objection rules, Petition at 23a, and that therefore plenary review in this Court is not precluded. While such an argument has some force in the abstract, see Payton v. New York, 100 S. Ct. 1371, 1378 n.9 (1980), it would not be wholly appropriate here. In accordance with its own case law regarding unseasonably raised yet arguably fundamental claims of error, State v. Evans, 165 Conn. 61, 70, 327 A.2d 576 (1973), the Connecticut Supreme Court expressly limited its review to a determination of whether "the record clearly demonstrates a deprivation of a fundamental constitutional right." Petition at 27a. Logically, if this Court will honor state contemporaneous objection rules when the state courts enforce them, Michigan v. Tyler, supra, but not when there is no such enforcement, Payton v. New York, supra, then when a state court, pursuant to such rules, affords but a limited review,

this Court's review, if any, must be similarly limited. Thus this Court can at most look to see "whether the record clearly demonstrates a deprivation of a fundamental constitutional right."

As indicated, the dispositive issue here is whether the person who performed the abortion in question was a physician. Certainly the record does not "clearly demonstrate[]" that he was. Indeed, one could say that the record supports precisely the opposite finding.[6] There is, therefore, no necessity for further review.

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[6] The corrected opinion of the Connecticut Supreme Court reads that "[t]he abortion was performed by a person who used the name of 'Dr. Walker' as an alias in a motel room with an implement described as a 'shoehorn device' while the defendant fed the woman some pills." Petition at 1d. These facts indicate that the person performing the abortion used something less than medically-approved methods.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

STATE OF CONNECTICUT
Respondent

/s/AUSTIN J. McGUIGAN
AUSTIN J. McGUIGAN
Chief State's Attorney
100 S. Turnpike Road
Wallingford, CT 06492
(203) 265-2373

Counsel of Record for
Respondent

With Whom on the Brief:

CARL SCHUMAN
Assistant State's Attorney
Appellate Unit
Office of the Chief
State's Attorney

I hereby certify that three copies of this brief have been mailed by August 16, 1982 to John R. Williams, Esquire, Williams & Wise, 265 Church Street, New Haven, Connecticut 06510.

/s/ CARL SCHUMAN
CARL SCHUMAN
Assistant State's
Attorney